No. 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

DOYLE SMITH,

v.

EVENING NEWS ASSOCIATION, *Respondent.*

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF MICHIGAN

BRIEF FOR THE RESPONDENT

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OPINIONS BELOW

The opinion of the Supreme Court of Michigan (R. 23-36) has been officially reported in 362 Mich. 350 (106 N.W. 2d 785).

JURISDICTION

The jurisdiction of this Court rests on 28 U.S.C., § 1257 (3).

STATUTES INVOLVED

In addition to the statutes specifically mentioned and quoted by Petitioner, there are involved portions of Section 10(b) and Section 10(c) of the National Labor Relations Act, as amended, 61 Stat. 136ff., 29 U.S.C. § 141; 1257, Title 28, U. S. Code; and § 609.13, Compiled Laws of Michigan for 1948. These are as follows:

"Prevention of Unfair Labor Practices"

"Sec. 10(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. * * * "

"Sec. 10(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided*, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: * * * "

Title 28, United States Code
Judiciary and Judicial Procedure

§ 1257: "Final judgments or decrees rendered by the highest court of a State in which a decision could be made may be reviewed by the Supreme Court as follows:

* * *

"(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

§609.13, Compiled Laws of Michigan, 1948.

"Sec. 13. All actions in any of the courts of this state shall be commenced within 6 years next after the causes of action shall accrue, and not afterwards, except as hereinafter specified. * * * "

QUESTION PRESENTED

Whether a common law action by an individual employee for back-pay for breach of an agreement with his employer may be maintained in a state court, where the sole conduct of the defendant-employer allegedly constituting the breach was a conceded violation of § 8(a) of the National Labor Relations Act?

STATEMENT

This is an action in assumpsit brought in the Circuit Court for the County of Wayne (Michigan) at law by plain-

tiff (Petitioner herein) for himself, and as assignee of other employees of defendant (Respondent herein), for wages due, against Respondent for the alleged breach of a collective bargaining agreement providing certain benefits to Petitioner and his assignees (R. 4) The parties to the collective agreement were the Respondent and the Newspaper Guild of Detroit, a labor organization (R. 2-5). The latter was not a party to this action. Petitioner, and his assignors, were and are employees of Respondent, and were members of the Newspaper Guild of Detroit at the time the Respondent engaged in the activities complained of in the state court action (R. 3-4).

Respondent's conduct, allegedly constituting a breach of contract, consisted of permitting its nonunion employees (in the Editorial Department, Business Office and Advertising Department) to work full time during a strike by another labor organization at Respondent's plant, while Petitioner (and his assignors) were not permitted to work at all, or only part time (R. 4).

Petitioner claimed that he and his assignors were laid off, or not employed full time, solely because of their membership in the Guild, and this was said to be a discrimination forbidden by Article IV, Section 5, of the aforesaid collective bargaining agreement, reading as follows (R. 4, 21):

> "5. There shall be no discrimination against any employee because of his membership or activity in the Guild."

Petitioner in his state court action sought to recover money damages, the measure of which was the pay he and his assignors would have received under their individual employment contracts had they been employed full time (R. 4-5, 21). No other relief was prayed for.

After the case was at issue and pre-trial proceedings had been completed (R. 21-23), Respondent moved to dismiss the action for lack of jurisdiction on the grounds that Petitioner charged Respondent with acts which, if true, constituted an unfair labor practice as defined in the National Labor Relations Act, as amended (hereinafter sometimes referred to as "the Act"); and the National Labor Relations Board had exclusive jurisdiction of the subject matter of Petitioner's claim (R. 11).

For the purpose of this Motion it was stipulated that Respondent was engaged in commerce within the meaning of the Act (R. 9). Petitioner and his assignors did not file a complaint with the National Labor Relations Board, nor did anyone on their behalf (R. 10, 25). This action was commenced after the limitations period provided by the Act for filing an unfair labor practice charge had expired (R. 1, 4).

After a hearing on Respondent's motion the trial court dismissed the action for lack of jurisdiction (R. 9-20). On appeal to the Supreme Court of Michigan, it was conceded that the conduct alleged as constituting a breach of contract would also constitute an unfair labor practice under the Act. The Supreme Court affirmed the court below without dissent (R. 23-36). 362 Mich. 350.

SUMMARY OF ARGUMENT

This appeal demonstrates the wisdom of the Court's remark in an earlier case that the doctrine of federal preemption "can be rendered progressively clear only by the course of litigation." *Weber* v. *Anheuser-Busch*, 348 U. S. 468, 480, 481. And, the manner in which that doctrine has developed, case by case, likewise makes it clear that it is unwise for counsel to indulge in sweeping generalities as a

solution to the new and different problems presented by this case.

In our view this case presents for the first time two issues fundamental to the interpretation and administration of the Labor Management Relations Act as a whole. In a sense they are interrelated, as will be seen from the argument, although involving different sections of the Act. In the context in which these issues arise, the problem may be simply stated. The answers are, however, by no means as simple.

The first issue is the jurisdictional and substantive scope of § 301(a). Petitioner's brief does not address itself to this problem at all. It simply assumes that this is a case within the purview of § 301, and proceeds from there to the discussion of a number of matters which are irrelevant to the issue.[1] This action is not and could not have been within the purview of § 301(a). It is a common law action by Petitioner, an individual employee, for back pay under an individual employment contract allegedly due because of a claimed breach of a labor contract between Respondent (his employer) and a labor organization, not a party to this action. Whichever of the opinions we follow in *Association of Westinghouse Salaried Employees* v. *Westinghouse Corp.*, 348 U. S. 437, none would sanction § 301 jurisdiction in this case. Likewise, with due humility considering the great debate that surrounds the meaning of *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448, that case clearly did not unseat *Westinghouse*, nor do its implications necessarily reach this case.

The cases principally relied on by Petitioner, *Dowd Box Co.* v. *Courtney*, 368 U. S. 502, and others decided at the

[1] Brief of Amicus Curiae (hereinafter referred to as "AB") also assumes this to be a suit within the purview of Sec. 301 (a), except for a brief discussion at p. 11, n. 9, which is not much more than a flat assertion that this is so.

last term, held that in a suit within the purview of §301(a) of the Labor Management Relations Act 1947, the pre-emptive doctrine of cases such as *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, is not relevant. That holding is, of course, accepted. However, none of these cases, in our view, considered or decided the instant issue inasmuch as each was premised on an acknowledged §301(a) jurisdiction or was considered by the Court to be within the scope of that section of the Act. By contrast, this action can not be forced into the §301(a) mold for two reasons, it is between an individual employee and his employer and it is a suit to enforce "the uniquely personal right" of an employee to receive compensation. *Westinghouse*, 348 U. S. at p. 461. Although not directly passed on heretofore, the inference is plain from prior decisions of this Court that it would regard such an action as outside the scope of §301(a). The issue has been posed in numerous lower court cases and almost without exception the holding has been that such actions are not within that section.

The importance of the above is that if this case is not within the purview of §301 it must fall in an area where Congress did not legislate but "left to the usual processes of the law", in which event a state court would be free to apply its own state law and its own concepts of contract law. An employee has always been able to enforce his individual rights under a labor contract, at least in Michigan. In such cases we can perceive no federal question jurisdiction which would permit this Court "to resolve and accommodate such diversities and conflicts" as may arise. *Dowd Box*, *supra*, 368 U. S. at 514. If this be the case, and with a conceded unfair labor practice present, Federal pre-emption should most certainly be invoked, whether state power be derived from the contract or otherwise.

This is not an arbitration case. We are not here concerned with the enforcement of a contract to arbitrate (which is within the purview of § 301(a) and hence subject to review by the federal courts), nor with the withdrawal of arbitral jurisdiction, nor with what the Court said in cases such as *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, relative to the policy of Congress favoring the settlement of industrial disputes by arbitration. This is a common law action, to which the Michigan court (and every other state court) will be free to apply its own legal concepts, irrespective of "federal labor law". Viewed in this light, we believe Congress had quite definite intentions that no such jurisdiction should exist.

The issue of Federal pre-emption, if this should be deemed a § 301 case, we approach with some hesitancy, considering the broad language in *Charles Dowd Box Co.* v. *Courtney*, 368 U. S. 502, and *Local 174, Teamsters Union* v. *Lucas Flour Co.*, 369 U. S. 95, concerning the relevancy of the pre-emption doctrine in § 301 cases. However, we are convinced from a reading of the opinions, and the briefs filed and oral arguments made to this Court in those cases, that there were there involved many factors not present here, including conduct or activity only arguably subject to the Act and for which the Board provided no appropriate remedy. This case, by contrast, presents the issue of pre-emption simply and directly because it involves not only a conceded unfair labor practice (if the allegations of the declaration are true) but further the Board can provide the same relief requested of the state court. These differences we feel demand presentation of the pre-emption issue in our brief and argument—even though by doing so we may

risk the displeasure of the Court in argui question which some may think has already been decide..

No matter how Petitioner's brief seeks to mask the issue by its constant reference to conduct "arguably" subject to the Act that also is a breach of contract, recognition of his position will result in direct collision and inevitable conflict between the Board, to which Congress committed primary and exclusive jurisdiction over unfair labor practices, and the state courts. The "centralized administration of specially designed procedures * * to obtain uniform application of its substantive rules" by the Board, as contemplated by Congress, cannot help but be impaired. Further, this concurrent and independent jurisdiction will be possible of creation by the simple expedient of contract language requiring the parties to abide by the terms of § 8 of the Act, or to obey the law. With due deference to the language of the Court regarding Federal pre-emption vis-a-vis contract enforcement under § 301(a) in *Dowd Box* and *Lucas Flour*, we cannot believe that those cases were intended to reach this situation. Simply because Congress rejected a proposed amendment to the Act making the breach of a collective bargaining agreement an unfair labor practice, and its stated preference that such matters be left to "the usual processes of the law," does not evidence an intent to permit encroachment on the long established and well recognized jurisdiction of the Board over § 8 cases. We recognize, of course, that such a contract does not foreclose Board action, *if it is invoked*. The point is that the aggrieved party need not go to the Board within the time prescribed by the Act, but may, within the varying state limitations periods (six (6) years in Michigan), choose another forum to act on the same conduct under the guise of contract and secure the same relief, back pay; or he

may likewise sue his union if there are § 8(b) undertakings in the contract. To sanction such litigation will hardly contribute to industrial peace.

ARGUMENT

I.

WHERE CONDUCT IS CONCEDEDLY AN UNFAIR LABOR PRACTICE WITHIN THE JURISDICTION OF THE NATIONAL LABOR RELATIONS BOARD AN INDIVIDUAL EMPLOYEE SHOULD NOT BE PERMITTED TO SUE IN A STATE COURT BECAUSE IT IS ALSO A BREACH OF CONTRACT.

This case presents for the first time a narrow issue of importance in the administration of the national labor laws. We are not here concerned with conduct "arguably subject" to the Labor Management Relations Act, but conduct which, if proven, is concededly within the Board's classic jurisdiction and for which it could provide the self-same remedy as is prayed for in the state court.[2] We are not concerned with contract language extraneous to that of the National Labor Relations Act, requiring interpretation as to the intent of the parties, for the contract provision in this case simply paraphrases the language of the Act (as Petitioner concedes) and does no more than had the parties simply agreed to abide by the terms of § 8(a) (3) of

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[2] As Amicus concedes (AB 16, n. 15), the measure of relief granted, whether by the state court or the National Labor Relations Board, would be substantially the same in this case. Neither Petitioner nor Amicus argue that Respondent's conduct in this case, if proven, would not have constituted an unfair labor practice under Sec. 8 (a) (3) of the National Labor Relations Act. Both admit that the Petitioner (and his assignors) could have gone to the National Labor Relations Board. Further, the Board, this being a "discrimination" case, would have been required to give it priority in handling pursuant to Sec. 10(m) of the Act, as amended. Title 29 U.S.C. § 160(m) 72 Stat. 945, 73 Stat. 544. Amicus admits that Petitioner did not file an unfair labor practice charge against Respondent, and would now be barred from doing so (AB 3, n. 3). Instead this suit was commenced in the state court after six-months period had expired for the filing of an unfair labor practice charge with the Board.

the Act.[3] It is a startling proposition to us that by such a simple expedient an individual employee can gain a choice of forum in which to sue either an employer or a labor organization for what by any name is an unfair labor practice.[4]

At the risk of repetition, the rule in *Garner* v. *Teamsters Union*, 346 U. S. 485, 490, is again set forth:

> "Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid [those] diversi-

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[3] Both Petitioner and Amicus admit that the sole provision of the collective bargaining agreement between Respondent and the Guild relied on by the Petitioner simply paraphrases the language of Sec. 8 (a) (3) of the Act. As Amicus says (AB 3, n. 3): "Section 8 (a) (3) of the National Labor Relations Act ** makes it an unfair labor practice for an employer by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." By comparison, Art. IV, Sec. 5 of the collective agreement relied on by Petitioner provided that: "There shall be no discrimination against any employee because of his membership or activity in the Guild (a labor organization)" (R. 4). This does no more than paraphrase Sec. 8 (a) (3) of the Taft-Hartley Act and Sec. 8 (3) of the Wagner Act, as those sections have been construed by the Court and the Board. *Associated Press* v. *Labor Board*, 301 U.S. 103, 132; *Radio Officers* v. *Labor Board*, 347 U.S. 17, 42 et seq.

[4] Provisions prohibiting discrimination by the employer, the union or both are not uncommon in collective agreements. Dunau, *"Contractual Prohibition of Unfair Labor Practices: Jurisdictional Problems*, 57 Col. L. Rev. 52, 68-69. "The Employer's promise covers substantially the same ground as sections 8 (a) (1) and (3) of the NLRA, and the union's promise much the same ground as section 8 (b) (1) (A)." Hence, in cases like this, Petitioner's argument realistically viewed would provide a choice of forum for the grievant which cannot help but encourage "forum shopping" and discourage "centralized administration ** to obtain uniform application of its substantive rules", directly contrary to the purpose attributed to

> ties and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies. * * * A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law."

The practical effect of Petitioner's argument is self-evident. No longer will the Board be the primary and exclusive tribunal for the application of the rules laid down by Congress in § 8 of the Act. No longer will its "particular procedures" necessarily apply. No longer will the limitations period prescribed by Congress in the Act for the filing of charges necessarily control. Instead the limitations periods provided by the various states (in Michigan six (6) years) may govern. This is all true because a plaintiff may according to Petitioner, characterize conduct which constitutes an unfair labor practice as a contract violation, and thereby circumvent the plain mandate of Congress that jurisdiction of such matters be vested primarily and exclusively in the National Labor Relations Board. We do not debate the fact, nor need we, that such a contract provision bars access to the Board. It does not. But, it most certainly *affects* the jurisdiction of the Board to remedy unfair labor practices by creating a new and different

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Congress in *Garner* v. *Teamsters Union*, 346 U.S. 485, 490-491. Where a collective agreement, such as this, simply borrows the language of the Act or merely incorporates it by reference, a court, if it has jurisdiction, must determine under guise of breach of contract whether an unfair labor practice has been committed. The trial court may, and probably will (through ignorance, if for no other reason), apply a different rule than the Board, which has traditionally handled Sec. 8 "discrimination" cases to the exclusion of the trial courts, state or federal. The fact that this concurrent independent jurisdiction can be created by "private" choice of the parties (assuming "litigation" to be a choice) should condemn the practice rather than support it. The employee's "right" in this case is one of the new and distinctive rights which Congress created and gave exclusive jurisdiction to the Board to enforce. Limitation or restriction of that right by private agreement should not be encouraged.

[5] Sec. 609.13, Michigan C.L., 1948. Quoted supra, under Statutes.

forum which an individual may choose for various and sundry reasons—political and otherwise—to sue the parties to a labor contract, be it employer or labor organization. The National Labor Relations Board acts only upon charges filed, it may not act *sua sponte* upon unfair labor practices. The rule suggested by Petitioner is obviously conducive to conflict.

A.

THIS ACTION IS NOT WITHIN THE PURVIEW OF SECTION 301 (a).

Petitioner's argument, by its reliance on *Dowd Box* and related cases decided at the last term assumes that this action is within the purview of § 301(a) of the National Labor Relations Act.[6] This ready assumption without discussion seems to us to be without foundation in the decisions of this Court, or of the lower courts which have considered the question. Petitioner is an individual employee seeking back-pay pursuant to an individual employment contract, for an alleged breach of a collective bargaining contract to which he was not a party. The Union, which was a party to the collective agreement allegedly breached, is not a party to this action and seeks no relief, nor does Petitioner on its behalf. Thus, this action is even further removed from the scope of § 301(a) than was *Association of Westinghouse Salaried Employees* v. *Westinghouse Electric Corp.*, 348 U. S. 437, where a majority of the Court held that a union might not sue on behalf of its members for compensation allegedly due them by reason of the breach of a collective

[6] Section 301(a) (Title 29 U.S.C. 185) provides that: "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

bargaining agreement. The conclusion reached by the majority in that case was that Congress did not intend by § 301(a) to confer on the courts jurisdiction to enforce such rights. Nothing was found in the statute or the legislative history of the Act justifying the vesting of such power in the federal courts. The dissenting opinion would have recognized the standing of the union to sue, but it also concurred with Mr. Justice Reed's analysis of federal labor law as related to § 301(a). His opinion concluded that (348 U. S. at 462):

> "• • • § 301, by granting federal jurisdiction over actions between employers and unions on collective bargaining contracts, *does make breaches of them by either of those parties actionable.*" (Emphasis ours.)

and (348 U. S. at 463-464):

> "• • • Congress by § 301 has manifested its purpose to vest jurisdiction over breaches, *to a certain extent*, in the federal courts. Whether the rules of substantive law applied by the federal courts are derived from federal or state sources is immaterial. The rules are truly federal, not state. The cause of action for breach of contract is thus a cause of action arising under federal law, the source of federal judicial power under Art. III of the Constitution." (Emphasis supplied.)

Textile Workers Union v. *Lincoln Mills*, 353 U. S. 448, expressly distinguished *Westinghouse* and did not overrule it. The majority, adopting Mr. Justice Reed's reasoning in *Westinghouse*, did hold that § 301(a) authorized a suit by a union to enforce specific performance of an agreement to arbitrate, and that "• • • the substantive law to apply in suits under § 301(a) is federal law, which the courts must fashion from the policy of our national labor laws." (353 U. S. at

456). We find nothing in *Lincoln Mills* which would extend the jurisdictional scope of § 301 to include suits by individual employees to enforce "uniquely personal rights."[7] (348 U. S. at 461)

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[7] The concurring opinion of the Chief Justice (joined by Mr. Justice Clark) in *Westinghouse*, stated that the legislative history of Section 301 (a) was not sufficiently clear to indicate that Congress intended to thereby authorize a union to enforce in a federal court the "uniquely personal right" of an employee for whom it had bargained to receive compensation for services rendered his employer. 348 U.S. at 461. In *Lincoln Mills*, the majority opinion expressly distinguished *Westinghouse*. 353 U.S. at 456 n. 6, saying:

> "*Westinghouse* . . . is quite a different case. There the union sued to recover unpaid wages on behalf of some 4,000 employees. The basic question concerned the standing of the union to sue and recover on those individual employment contracts. The question here concerns the right of the union to enforce the agreement to arbitrate which it made with the employer."

Mr. Justice Burton (with Mr. Justice Harlan) in their opinion in *Lincoln Mills*, concurring and dissenting in part, agreed that the trial court had jurisdiction because (353 U.S. at 460):

> "The District Court had jurisdiction over the action since it involved an obligation running to a union—a union controversy—and not uniquely personal rights of employees sought to be enforced by a union **."

Lincoln Mills, despite the above, has been the subject of much comment including speculation as to whether *Lincoln Mills* did or did not overrule *Westinghouse*. Bickel & Wellington, *"Legislative Purpose and the Judicial Process: The Lincoln Mills Case,"* 71 Harv. L.R. 1; Note, *The Supreme Court, 1956 Term*, 71 Harv L.R. 85,173 et seq.; Gregory, *"The Law of the Collective Agreement,"* 57 Mich. L.R. 635; Bunn, *"Lincoln Mills and the Jurisdiction to Enfroce Collective Agreement,"* 43 Va. L. Rev. 1247.

Despite this speculation concerning *Lincoln Mills* the lower courts have uniformly applied the distinction and refused enforcement of "uniquely personal rights"; *United Steelworkers* v. *Pullman-Standard*, 241 F 2d 547 (CA 3); *Allied Oil Workers* v. *Ethyl Corp.*, 301 F 2d 104 (CA 5); *Woodward Iron Co.* v. *Ware*, 261 F 2d 138 (CA 5); *Sheppard* v. *Cornelius*, 302 F 2d 89 (CA 4); *General Drivers* v. *Riss*, 298 F 2d 341 (CA 6); *United Steelworkers* v. *New Park Mining Co.*, 273 F 2d 352 (CA 10); *Local Lodge, Machinists* v. *Servel*, 269 F. 2d 692 (CA 7), cert. den. 361 U. S. 884.

Petitioner's argument (B. 7, 12-20)* is primarily based on certain cases decided at the last term, all of which were held to be within the purview of § 301(a). *Charles Dowd Box Co.* v. *Courtney*, 368 U. S. 502; *Retail Clerks* v. *Lion Dry Goods*, 369 U. S. 17; *Local 175, Teamsters Union* v. *Lucas Flour Co.*, 369 U. S. 95; and *Atkinson* v. *Sinclair Refining Co.*, 370 U. S. 238. Since his argument is confined to the question of federal pre-emption, we find no discussion but simply an assumption that this case is likewise within § 301(a) of the Act. No such assump-

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* Amicus brief likewise assumes that this an action within the purview of Section 301 (a), excepting for a brief discussion in a footnote (AB 11, n. 9). There it is simply said that since the contract sued on is one "between an employer and labor organization representing employees in an industry affecting commerce" the suit is controlled by federal, and not state law. We are given no reasons for this flat assertion. It is obviously contrary to our understanding of *Westinghouse*, *Lincoln Mills*, and every lower court case with which we are familiar. It is then said that this is not a *Westinghouse* case anyway because the provision sought to be enforced—banning discrimination on account of union membership—affects the union as well as the individual employees. This ignores the fact that this a suit for back pay by an employee, that the Union is not a party (and its position is not known), no relief is sought on its behalf and it would not share in any recovery. We know of no case supporting such a theory. All are to the contrary. As was said in *Sheppard* v. *Cornelius*, 302 F 2d 89, 91 (like this case, a suit by individual employees for breach of a collective agreement):

> "Here, the employees' representative, if there is one, is not a party to these actions. The Mine Workers are not here contending that they have a contract with the employers which the employers have violated. Jurisdiction under Sec. 301 of the Labor Management Relations Act, to adjudicate claims by or against a labor organization representing employees does not extend to the claims of two employees asserting in their own names individual rights to additional compensation under a contract which they claim to be applicable.
>
> "Individual rights, individually asserted, though stemming from a collective employment agreement and solely dependent upon it, cannot be enforced under Sec. 301 of the Labor Management Relations Act. If there is substance in the rights asserted by these employees, the rights may be enforced through *traditional actions brought in the state courts*. There is no federal jurisdiction to enforce them." (Emphasis ours)

tion is warranted. We find no relevance to our issues, pre-

emption or otherwise, in *Lion Dry Goods.*[9] *Dowd Box* teaches that a state court does have jurisdiction, concurrently, with the Federal courts over suits within the purview of § 301(a). The Court likewise there made it plain that the rule in *Garner,* quoted above, p. 12, withdrawing from the states jurisdiction over controversies *arguably subject* to the jurisdiction of the National Labor Relations Board did not apply with respect to the enforcement of collective agreements under § 301(a).[10] This left unanswered the two questions presented by this case. What of the suit not within the purview of § 301(a) and does a state court have jurisdiction over conduct *concededly* subject to the Board's jurisdiction simply because the conduct also constitutes a breach of contract?

Lucas Flour was obviously a suit within the purview of § 301(a), it being an action by the employer against a union for breach of an implied no strike clause in a collective bargaining agreement. The Washington court there held that

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[9] *Retail Clerks* v. *Lion Dry Goods*, 369 U.S. 17, discussed by Petitioner (B. 14) sheds no light on our Section 301 problem, it being an action clearly within that Section to enforce an arbitration award. *Lincoln Mills*, supra; *United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564. The question of Federal pre-emption was neither raised nor discussed. However, where the action is within Section 301 (which is not the case here) there are cogent reasons why Federal pre-emption should not apply (except where there is a clear conflict. Judicial action under Section 301 is reviewable by this Court and diversities and conflicts may be thus corrected. Where the action, as here, is not within Section 301 it is not in our view subject to such review for the reasons hereinafter stated. Moreover, the peculiar attributes of the arbitral process justify its use even tho matters arguably subject to the Board's jurisdiction ar considered by the Arbitrator. The same is not true of a state court for the reasons hereinafter discussed.

[10] In this case we are not concerned with so-called "peripheral" or "penumbral" aspects of the Board's jurisdiction as in *Weber* v. *Anheuser-Busch, Inc.*, 348 U.S. 468, or with a case where the Board will not act as in *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, or with a situation where the Board cannot give relief as in *United Construction Workers* v. *Laburnum Construction Corp.*, 347 U.S. 656. Here the conduct complained of, if proven, is within the Board's traditional jurisdiction and it can grant the same relief as is asked of the state court.

it was not divested of jurisdiction by § 301. This Court, for the reasons set forth in *Dowd Box*, agreed (369 U. S. at 101). The Court then held that since it was a § 301 type action, the Washington court was not free "to decide this controversy within the limited horizon of its local law" (369 U. S. at 102), but that "incompatible doctrines of local law must give way to principles of federal labor law" (369 U. S. at 102). Again, because of an argument based on Federal pre-emption, the Court restated its position in *Dowd Box*, saying 369 U. S. at 101, n. 9):

> "Since this was a suit for violation of a collective bargaining contract within the purview of § 301(a) of the Labor Management Relations Act of 1947, the pre-emptive doctrine of cases such as *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, based upon the exclusive jurisdiction of the National Labor Relations Board, is not relevant . . . ."

The question in the case at bar therefore remains unanswered by *Lucas Flour*: i.e., what of suits not within the purview of § 301(a)?

In *Atkinson*, an employer sought damages from a union and certain individual employees, alleged to be agents of the union, for breach of a no-strike clause in a labor contract between the union and the employer. Jurisdiction of the action against the union was based on § 301, and against the individual employees on diversity. The Court ordered the action against the individuals dismissed on the merits, since under § 301, officers and members of a union acting for the union, cannot be individually liable for breach of a contract, when the union itself is liable for such breach. 370 U. S. at 247. In answer to the union's pre-emption argument, the Court again noted that it being a § 301 suit, the doctrine was inapplicable, citing *Lucas Flour* 370 U. S. at

245, n. 5. The Court was not required to consider whether an individual is entitled to sue under § 301(a), nor was it faced with a conceded unfair labor practice.

We are convinced from a review of these decisions that in the present state of the law, and absent a reversal of *Westinghouse*, a suit by an individual employee for compensation by reason of the breach of a collective bargaining contract is beyond the grant of jurisdiction in § 301(a). Nor would the reversal of *Westinghouse* necessarily reach this case. It is one thing to permit a union to sue on behalf of its members, and quite another to open the doors of the federal courts to suits by individual employees regardless of the amount involved or diversity but simply because the suit involves a labor contract affecting commerce.

Mr. Justice Frankfurter in *Westinghouse*, as one ground for holding the union's action on behalf of its members beyond the intendment of § 301(a), noted that (348 U. S. at 460):

> "* * * such an interpretation would bring to the federal courts an extensive range of litigation heretofore entertained by the States, we conclude that Congress did not will this result. There was no suggestion that Congress, at a time when its attention was directed to congestion in the federal courts, particularly in the heavy industrial areas, intended to open the doors of the federal courts to a potential flood of grievances based upon an employer's failure to comply with terms of a collective agreement relating to compensation, terms peculiar in the individual benefit which is their subject matter, and which, when violated, give a cause of action to the individual employee. The employees have always been able to enforce their individual rights in the state courts."[11]

[11] Citing numerous state court decisions. 348 U.S. at 460, n. 29.

The lower federal courts have been confronted on numerous occasions with an individual employee's claim that § 301(a) gave the district courts jurisdiction over his action against an employer, a union or both; or of a union's action on his behalf. Virtually, without exception these decisions have held an individual employee's action or claim not within the purview of § 301(a).[12] Although we do not intend to burden the Court with any detailed discussion of these cases, they do furnish a frightening insight into the problems which would result from such a broadening of the scope of § 301(a).

In *Dimeco* v. *Fisher*, 185 F Supp. 213 (D. NJ 1960), in remanding to the state court an individual employee's action against his employer for wrongful discharge and against his labor union for failure to properly represent him, the district court held that it was without jurisdiction

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[12] *United Protective Workers* v. *Ford Motor Co.*, 194 F 2d 997 (CA 7, 1952); *United Electrical R. & M. Workers* v. *General Electric*, 231 F 2d 259 (CADC, 1956); *Copra* v. *Suro* (CA1, 1956) 236 F. 2d 107; *Silverton* v. *Valley Transit Cement Co.*, 249 F 2d 409 (CA9, 1957); *Adams* v. *International Brotherhood*, 262 F 2d 836 (CA10, 1968); *International Brotherhood* v. *Morrison-Knudsen*, 270 F 2d 530; *United Packinghouse Workers* v. *Wilson & Co.*, 80 *F Supp.* 563 (ND Ill., 1948); *Schatte* v. *International Alliance*, 84 F Supp. 669 (SD Calif., 1949) aff'd on other grds. 182 F. 2d 158 (CA9) cert. den. 340 U.S. 340 U.S. 828; *Mackay* v. *Loew's Inc.*, 84 F Supp .676 (SD Calif. 1949), aff'd on other grds. 182 F 2d 170 (CA9), cert. den. 340 U.S. 828; *valeski* v. *Local 401*, 91 F Supp. 552 (NJ, 1950); *John Hancock Mutual Life Ins. Co.* v *United O. & P. Workers*, 93 F Supp. 296 (NJ, 1950); *Brooks* v. *Hunkin-Conkey Const. Co.*, 95 F Supp. 608 (WD Pa, 1951); *Waialua* v. *United Sugar Workers*, 114 F Supp. 243 (Hawaii, 1953); *Ketcher* v. *Sheet Metal Workers*, 115 F Supp. 802 (Ark. 1953); *Silverton* v. *Rich*, 119 F Supp. 434 (SD Calif., 1954); *Disanti* v. *Local 53*, 126 F Supp. 747 (ED Pa., 1954); *Local Union No. 420* v. *Carrier Corp.*, 130 F Supp. 26 (ED Pa., 1955); *Holman* v. *Industrial Stamping*, 142 *F Supp.* 243 (Hawaii, 1953); *Katcher* v. *Sheet Metal Workers*, 115 F Supp. 423 (Mass., 1957); *United Steelworkers* v. *New Park Mining Co.*, 160 F Supp. 107 (Utah, 1958), aff'd on this grd., 273 F 2d 352 (CA10); *Dimeco* v. *Fisher*, 185 F Supp. 213 (NJ, 1960); *Allen* v. *Armored Car Chauffeurs Union*, 185 F Supp. 492 (NJ, 1960); *Consolidated Laundries* v. *Craft*, 185 F Supp. 631 (SD NY, 1960); *Burgos* v. *Waterman Steamship Co.*, 189 F Supp. 683 (Puerto Rico, 1960); *United Shoe Workers* v. *Brooks Shoe Mfg. Co.*, 191 F Supp. 288 (ED Pa, 1960); *Frin* v. *DeLuca*, 194 F Supp. 852 (ED NY, 1961). Contra: *Isbrandtsen Co.* v. *International Longshoremen*, 204 F 2d 495 (CA3, 1953), (Dictum). Cf. Ann., 99 L Ed 467, 538; 17 A.L.R. 2d 614, 619.

under § 301(a). Noting the statement in *Westinghouse* (quoted supra, p. 20) that Congress did not intend to flood the Federal courts with such litigation, the court said (185 F Supp. 215):

> "• • • If so, Congress surely did not intend to flood the Federal courts with the even greater number of cases which would be brought, not by Unions for the benefit of their many individual employees, but by any and all individual employees on their own behalf, and either for their pay, or to prevent their discharge.
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> • • • • •
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> "This case is indeed a clear example of the need for limiting suits to those between Unions and employers. Here the Union took the grievance of the plaintiff up to, but not including, the arbitration stage. The Union decided, after careful consideration, that the employer had been correct in its action and that the grievance should not be taken to arbitration. If § 301(a) were to allow the individual to then come into Federal Court, whenever he was disgruntled at the decision of the Union not to arbitrate, the flood of litigation would indeed be overwhelming."

These are not reasons of expediency advanced by the courts, but have a solid foundation in the legislative history of § 301 which shows that Congress was acutely aware of the problem. Thus, the House Minority Report on Sec. 302 (predecessor of § 301) said in part (Appendix, *Lincoln Mills*, 353 U. S. at 520):

> "• • • It is feared that the result would be to involve the Federal courts, already overburdened, with a great mass of petty litigation over amounts less than $3,000, easily capable of being adjudicated effectively by the more numerous State

> courts. This type of action would undoubtedly invite the return of conditions in the Federal Courts during prohibition days, when they bogged down in litigation ordinarily handled by the average police court."

Although, "The legislative history of § 301 is somewhat cloudy and confusing," as *Lincoln Mills* observed, one point appears to be crystal clear and that is that Congress, in its consideration of § 301 and its predecessor bills, did not intend to extend that Section beyond the parties to the labor contract, i. e., the employer and the labor organization, as regards suits under § 301. Individual employee actions for breach of contract were apparently never contemplated. The legislative history relied on by the majority in *Lincoln Mills* is sufficient to support this conclusion, and the appendix to that case, setting forth the entire legislative history of § 301, reinforces this view. The overriding concern of Congress was to provide a forum where unions could sue and be sued as legal entities, but as *Lincoln Mills* notes (353 U. S. at 453):

> "• • • there was also a broader concern—a concern with a procedure for making such agreements enforceable in the courts *by either party.*" (Emphasis ours.)

And, quoting from the Senate and House Reports (353 U. S. at 454):

> "Thus collective bargaining contracts were made 'equally binding and enforceable on both parties.' (S. Rep.) As stated in the House Report, "• • • the new provision 'makes labor organizations equally responsible with employers for contract violation and *provides for suit by either against the other in the United States district courts.*'" (Emphasis ours.)

§301, appearing under Title III (significantly entitled **"Suits by and Against Labor Organizations"**), provides that "Suits for violation of contracts between an employer and a labor organization • • • may be brought in any district court of the United States having jurisdiction of the *parties* • • • " (Emphasis ours) The legislative history constantly refers to the *parties*. By "parties" Congress meant the parties to the labor contract, not employees or strangers to such a contract. Mr. Case made this clear in hearings on his bill (which contained provisions similar to § 301) when he said (353 U. S. Appendix at 490):

> " • • I do not think it would extend to individual members of the union, because the language is that the contract is made 'mutually and equally binding and enforceable against each of the *parties* thereto,' and under the Wagner Act *the party to the contract is the recognized bargaining agent.*" (Emphasis supplied)

Congress did make sure that individual employee-members of a union would not be liable for money judgments by § 301(b). The only other consideration given individual employees seems to have been a proposal, which was rejected, to make them liable where they participated in a "wildcat" strike.[13]

The only way of bringing an employee within the ambit of §301(a) is by construing the term "between an employer and a labor organization" as modifying the word "contracts" and not "suits." This would sweep into the federal courts every suit, regardless of amount or diversity, involving such a contract. The legislative history clearly supports no such construction, and the vast majority of courts di-

[13] Appendix to *Lincoln Mills*, 353 U.S. at 495; Amendment No. 3, amending H.R. 4908, subsection (d).

rectly faced with the problem have held, and properly so, that the term modifies both "suits" and "contracts." cf. note 12, supra.[14]

Where Congress intended in the Taft-Hartley Act to give rights to or create obligations binding on "employees," it said so, yet there is no mention of "employees" in § 301(a). And when rights were given others to sue, Congress expressly said so, as in § 303(b) of the Act.[15]

B.

THIS ACTION NOT BEING WITHIN THE PURVIEW OF SECTION 301 (a), THE STATE COURT WOULD BE FREE TO APPLY STATE LAW SUBJECT TO NO REVIEW BY THE FEDERAL COURTS.

If this is not an action within the purview of §301(a), and we believe it is not for the reasons stated, the question remains whether the state court in this case would be required to apply "Federal labor law," and whether its decision would be subject to review by a Federal Court.

We approach this question with the understanding that *Lincoln Mills* established that §301(a) is more than jurisdictional. As the Court there said (353 U. S. at 456):

> "• • • We conclude that the substantive law to apply in suits under § 301(a) is federal law, which

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[14] In the brief of Amicus Curiae, the above argument is swept aside with the flat assertion that this is a §301 suit because the contract sued on is one "between an employer and a labor organization." (AB, 11, foot note 11). This is not very illuminating, and is certainly contrary to the views of the Chief Justice, Justices Frankfurter, Minton, Burton, Clark and Reed in *Westinghouse*, the majority in *Lincoln Mills*, as well as Justices Burton and Harlan in their separate opinions in that case.

[15] Section 303(b) (Title 29, U.S.C. § 187(b)) in pertinent part reads as follows:

> "Whoever shall be injured in his business or property by reason •• (of) any violation of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 185 of this title (§ 301 of the Act) •••"

> the courts must fashion from the policy of our national labor laws."

Likewise, at the last term, *Dowd Box* and *Lucas Floor*, made it clear that state courts are not divested of jurisdiction of suits within the purview of § 301(a), but that such concurrent jurisdiction must be governed by the following principle. (*Lucas Floor*, 369 U. S. at 103):

> "The dimensions of §301 require the conclusion that substantive principles of federal labor law must be paramount *in the area covered by the Statute*. Comprehensiveness is inherent in the process by which the law is to be formulated under the mandate of *Lincoln Mills*, requiring issues raised in suits of a kind covered by §301 to be decided according to precepts of federal labor policy." (Emphasis Supplied)

From the above, it is clear that suits within the purview of §301(a), whether commenced in a state or federal court, are to be controlled by federal labor law, subject ultimately to review by this Court. But the question remains, what of the suit which is not within the purview of §301(a), as to which Congress did not intend to legislate?

Again resort must be had to *Lincoln Mills* for some basic premises. We know from that case (with the added light cast by *Lucas Floor* and *Dowd Box*), that, be it a state or "federal" rights and that "It is not uncommon for federal "federal" rights and that "it is not uncommon for federal courts to fashion federal law where federal rights are concerned." (353 U. S. at 457) Also, that there is no constitutional difficulty because "Article III, § 2, extends the judicial power to cases 'arising under . . . the Laws of the United States . . . . . '. The power of Congress to regulate

these labor-management controversies under the Commerce Clause is plaint. * * * A case or controversy arising under § 301(a) is, therefore, one within the purview of judicial power as defined in Article III" (353 U. S. at 457).

This still leaves unsolved the question—what federal "rights" and what substantive content did Congress intend in § 301(a). The solution of this question is complicated by the fact that on its face § 301 is jurisdictional and does not attempt to define or delimit the nature of the substantive rights created. As *Lincoln Mills* observed, "The range of judicial inventiveness will be determined by the nature of the problem." (353 U. S. at 457). But we would not assume from this that the Court intended the judicial power to exceed legislative boundaries.

Our prior review of what has been deemed to be beyond the scope of § 301(a) plainly points to the conclusion that Congress was concerned solely with, and only with, the enforceability of contracts by and between the parties thereto, i.e., an employer and a labor organization, and with their peculiar collective rights. A "federal" right to sue was given each. No significant discussion appears in the legislative history supporting a conclusion that § 301 was intended to regulate or affect an individual employee's right to sue or to create for him a "federal" right to sue or be sued.

Congress did not in § 301(a) exhaust its Commerce power over the subject matter of labor contracts, as Mr. Justice Reed observed in *Westinghouse* (348 U. S. at 463,464):

> ". . . Since the contract entered into through provisions of the Labor Act creates rights over which Congress has legislative authority, a breach of the contract is likewise within its power. Congress

by § 301 has manifested its purpose to vest jurisdiction over breaches, *to a certain extent*, in the federal courts." (Emphasis ours)

The *limited extent* of congressional action referred to is, of course, the limitation of § 301(a) to suits between employers and labor organizations on contracts between them, (or between labor organizations) (348 U. S. at 462). His opinion further made it clear that his reasoning (later adopted by the Court in *Lincoln Mills*) as to the substantive law to be applied in § 301 actions "*will be pertinent in cases which are deemed to have been properly brought under that section . . .*" (348 U. S. at 461) (Emphasis ours).

Murky as the legislative history of § 301 may be, it clearly supports the holding of the Chief Justice (joined by Mr. Justice Clark) in *Westinghouse* that it was not " • • sufficiently clear to indicate that Congress intended to authorize a union to enforce in a federal court the uniquely personal right of an employee for whom it had bargained to receive compensation. • • • " 348 U. S. at 461. *A fortiorari* this would include an individual employee's right to sue for back pay. There is no indication that Congress was at any time in its consideration of § 301 (or its predecessors) concerned with any thing other than the contractual rights of the employer and the union (the parties to the contract), and the mutual enforcement of those rights. Primarily, as every one agrees, Congress was concerned with the enforcement of no-strike clauses against unions. *Lincoln Mills*, 353 U. S. at 453 and n. 4. These mutual collective rights have been uniformly interpreted since *Lincoln Mills* as being restricted to matters of "peculiar concern" to the parties, e.g., the union's right to enforce the agreement to arbitrate which it made with the employer in *Lincoln Mills* as contrasted with *Westinghouse* where the

Union sued to enforce individual rights of its employee-members. 353 U. S. at 456, n. 6.[16] This difference is epitomized in a case relied on by Petitioner (B 16, n. 2) in support of his pre-emption argument. *United Steelworkers* v. *New Park Mining Co.*, 273 F 2d 352 (CA 10).[17] In that case,

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[16] *Copra* v. *Suro*, 236 F 2d 107 (CA 1); *Zdanok* v. *Glidden*, 288 F 2d 99 (CA 2); *United Steelworkers* v. *Pullman-Standard*, 241 F 2d 547 (CA 3); *Sheppard* v. *Cornelius*, 302 F 2d 89 (CA 4); *Woodward Iron Co.* v. *Ware*, 261 F. 2d 138 (CA 5); *General Driver's Union* v. *Riss*, 298 F 2d 341 (CA 6); *Local Lodge, Machinists* v. *Servel*, 268 F 2d 692, cert. den. 361 U.S. 884 (CA 7); *Silverton* v. *Valley Transit Cement*, 249 F 2d 409 (CA 9).

[17] In *New Park Mining* (cited in *Lucas Flour*, 369 U.S. at 101, n. 9 in support of the proposition that the preemption doctrine is not relevant in Sec. 301 cases) the Tenth Circuit held that the district court had jurisdiction of a suit to compel arbitration of a union claim that the employer had discharged employees, ceased operations and leased out the work to former employees for the purpose of avoiding its labor contract with the union. The employer's defense was that the termination of the contract was an unfair labor practice and within the exclusive jurisdiction of the National Labor Relations Board. Disposing of this contention the Court of Appeals said (273 F 2d at 357-358):

> "But our case does not involve any conflict between state and federal remedies, or private and public remedies. Rather we are concerned only with the exclusiveness of *two federally created rights or remedies in the same legislative scheme, i.e., the Labor Management Relations Act*. Section 301 of the Act is concerned with violations of contracts between an employer and a labor organization representing employees, the enforcement of which Congress left to the usual processes of the law' ***
>
> "The remedies for unfair labor practices under the Act were committed exclusively to the Board, but the Board's jurisdiction in that regard is limited to the effectuation of the purposes of the Act itself. The Board is not concerned with the enforcement of labor contracts between employer and Union representatives of employees ***."

By contrast, the Tenth Circuit refused jurisdiction of the claims of the individual employees who had joined in that suit to recover back wages and vacation pay because of the employer's conduct. In that respect the Court said (273 F 2d at 355):

> "* * * But fereral court jurisdiction thus conferred [by § 301(a) and (b)] has been restricted to contract violations of 'peculiar concern' to the Union as an organization, such as agreements to arbitrate wages, hours and conditions of employment ***; and to the enforcement of collective awards made pursuant to arbitration of grievances arising out of the labor contract. ***. Federal jurisdiction does not extend to the enforcement of rights which are 'uniquely personal' to the employees, such as back wages and vacation pay."

Hence, a common law suit such as this by individual employees in a state court for back pay is not a federally created "right," nor is it part of the "same legislative scheme" as suits within the purview of § 301 (a). Its accommodation with the exclusive jurisdiction of the Board over unfair labor practices, as suggested by the Tenth Circuit, cannot be justified on any such basis.

the court carefully distinguished between the rights of the employer-plaintiffs to recover accrued back wages and vacation pay (273 F 2d at 355) and the right of the union to enforce arbitration of a dispute even though it involved an unfair labor practice (273 F 2d at 357-358). The rights of the employees, even tho related to the unfair labor practice, the court held were not within the purview of Section 301 and beyond the jurisdiction of the Federal courts.

If the argument is to be accepted that Federal law controls all litigation involving labor contracts affecting commerce, then Congress did not act "*to a certain extent*," but to its fullest extent under the Commerce Clause. Petitioner's argument assumes that it did (as does Amicus), despite the lack of evidence in the legislative history of § 301 and its predecessor bills, that Congress had any such intention. It is Petitioner's burden, not ours, to establish such jurisdiction, and not by flat assertion.

We do know that when Congress considered and acted on § 301 (and the predecessor bills) it was well briefed on the then available judicial means of enforcing labor contracts in the various states. It was known that employees had always been able to enforce their individual rights in state courts applying state law (as was the case in Michigan).[18] The rejection of the Senate proposal making a breach of a labor contract an unfair labor practice cognizable by the Board, left enforcement to "*the usual processes of the law.*"[19] To the extent that, and on whatever theory, an individual employee was then able to enforce labor contracts in the state courts we can only presume

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[18] *Westinghouse*, cited, 348 U.S. at 460 and n. 29; *Cortez* v. *Ford Motor Co.*, 340 Mich. 108, 64 NW 2d 523.

[19] See H.R. Conference Report No. 510, 80th Congress, 1st Sess., p. 42, U.S. Code Cong. Service, 1947, p. 1147.

that Congress by this statement intended to leave untouched these traditional means of enforcement.[2] An individual employee's suit in 1946 and 1947 was not one enforcing a "federal" right, nor was it "usually" subject to federal law.

Encroachment on the traditional jurisdiction of state courts to apply their own legal concepts in employee actions should not be lightly inferred, no matter how compelling or desirable "the need for a single body of federal law." Unless there is clear evidence that Congress so intended, the simple jurisdictional grant of § 301(a) over suits between employers and labor organizations should not be extended to imply displacement of local law in suits outside its purview. Or put another way, the application of federal substantive law should be coextensive with the jurisdictional grant of § 301(a), and no more. This construction of a statute, which is at the very best ambiguous, is consistent with the Court's " * * * deeply felt and traditional reluctance of this Court to expand the jurisdiction of the federal courts through a board reading of jurisdictional statutes." *Romero* v. *International Terminals*, 358 U. S. 354, 379.

As we know from *Dowd Box* and *Lucas Flour*, state courts in § 301 actions must apply federal labor law in the exercise of their concurrent jurisdiction with the federal courts over suits coming within the purview of that section. This ruling renders academic consideration of prior state court cases

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[2] Since the jurisdictional and substantive scope to be given § 301 concerns federalism and the division of federal and state judicial powers, before finding that Congress by § 301 (a) intended a complete displacement of state law governing collective bargaining agreements, this statement by Senator Ferguson might again be considered (quoted in full in *Dowd Box*, 368 U.S. at 512):

> "Mr. Ferguson. Mr. President, there is nothing whatever in the now-being-considered amendment which takes away from the State courts ***all the present rights of the State Courts to adjudicate*** the rights between parties in relation to labor agreements . . . . " (Emphasis supplied).

where there arose a question as to the substantive law to be applied—state or federal.[21]

In the converse case, where the suit is outside the scope of § 301(a), those courts which have considered the question have clearly indicated that state common or statutory law governs, not federal labor law. This has been true both of state and federal courts.[22] The latter have faced this prob-

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[21] *Lucas Flour*, 369 U.S. at 102 (n. 10) noted that, "Of the many state courts which have assumed jurisdiction over suits involving contracts subject to § 301, few have explicitly considered the problem of state versus federal law." However, of those that did, as the Court notes, most held that federal law should govern. *McCarroll* v. *Los Angeles County Dist. Council of Carpenters*, 49 Cal. 2d 45, 60, 315 P. 2d 322, 330 (Employer granted injunction by state court against Union's violation of a no-strike clause in a labor contract. Cf. *Atkinson* v. *Sinclair Refining Co.*, 370 U. S. 238, and Dissenting Opinion at p. 226); *International Ass'n. of Machinists* v. *Cessna Aircraft Co.*, 186 Kan. 569, 352 P. 2d 420 (suit by Union against Employer to enforce arbitration agreement); *Harbison-Walker Refractories Co.* v. *United Brick & Clay Workers* (Ky.), 339 S. W. 2d 933 (§ 301 type action for enforcement of an arbitration award). In *Karcz* v. *Luther Mfg. Co.*, 338 Mass. 313, 155 N.E. 2d 441, 444 (an action by individual employees), the court, although finding it unnecessary to choose between state and federal law there being no apparent conflict, expressed doubt as to whether § 301 was applicable at all (in which case federal law would not control); *Springer* v. *Powder Power Tool Corp.*, 220 Or. 102, 348 P. 2d 1112, (like *Karcz*, an action by individual employees, resolved the question of applicable substantive law in the same way); *Clark* v. *Hein-Werner*, 8 Wisc. 2d 264, 100 N. W. 2d 317, to the same effect. These latter cases, although considering federal decisions, reflect serious doubt as to whether Federal law is controlling in a non-301 case.

[22] *Federal*: *Sheppard* v. *Cornelius*, 302 Fed. 2d 89 (CA 4); *Allied Oil Workers* v. *Ethyl Corp.*, 301 Fed. 2d 104 (CA 5); *General Drivers Union* v. *Riss*, 298 Fed. 2d 341 (CA 6); *Zdanok* v. *Glidden*, 288 Fed. 2d 99 (CA 2); *Communications Workers* v. *Ohio Bell Telephone Co.*, 265 Fed. 2d 221 (CA 6), cert. den. 361 U. S. 814; *Woodward Iron Co.* v. *Ware*, 261 Fed. 2d 138 (CA 5); *International Ladies Garment Workers* v. *Jay-Ann Co.*, 228 Fed. 2d 632, 633-636 (CA 5); *United Shoe Workers* v. *Brooks Shoe Co.*, 191 Fed. Supp. 288 (E. D., Pa.); *Allen* v. *Armored Car Chauffeurs Union*, 185 Fed. Supp. 492 (N. J.); *Dimeco* v. *Fisher*, 185 Fed. Supp. 213 (N. J.); *Silverton* v. *Rich*, 119 Fed. Supp. 434 (S. D., Calif.); *Waialua Agr. Co.* v. *United Sugar Workers*, 114 Fed. Supp. 243 (Hawaii).

State: *Bridges* v. *McGraw & Co.* (Ky.), 302 S. W. 2d 109; *Masetta* v. *National Bronze Co.* (Ohio App.), 107 N. E. 2d 243, rev'd. on other grds., 159 Ohio St. 306, 112 N. E. 2d 15; *Jenkins* v. *Schluderberg*, 217 Md. 556, 144 A. 2d 88; *McLean Dist. Co.* v. *Brewery & Beverage Drivers*, 254 Minn. 204, 94 N. W. 2d 514, cert. den. 360 U. S. 917; *General Bldg. Contractors Ass'n.* v. *Local Unions*, 370 Pa. 73, 87 A. 2d 250; *Coleman Co.* v. *International Union*, 181 Kan. 969, 317 P. 2d 831 (Compare with *Local Lodge No. 774, Int'l. Ass'n. of Machinists* v. *Cessna Aircraft*, 186 Kans. 569, 352 P. 2d 420, cited *Lucas Flour*, 369 U. S. at 102, footnote 10).

lem many times in applying *Westinghouse*, as modified by *Lincoln Mills*, to suits by a union seeking to enforce "uniquely personal rights" and in actions by individual employees, the union not being a party. In this latter category, their reasoning is typified by *Sheppard* v. *Cornelius*, 302 Fed. 2d 89, 91 (CA4), where it was said:

> "Here, the employees' representative, if there is one, is not a party to these actions. The Mine Workers are not here contending that they have a contract with the employers which the employers have violated. Jurisdiction under § 301 of the Labor Management Relations Act, to adjudicate claims by or against a labor organization representing employees does not extend to the claims of two employees asserting in their own names individual rights to additional compensation under a contract which they claim to be applicable.
>
> "Individual rights, individually asserted, though stemming from a collective employment agreement and solely dependent upon it, cannot be enforced under § 301 of the Labor Management Relations Act. If there is substance in the rights asserted by these employees, the rights may be enforced through traditional actions brought in the state courts. There is no federal jurisdiction to enforce them."

Reflecting the reasoning of the state courts, the Kentucky Court of Appeals said in *Bridges* v. *F. H. McGraw & Company*, 302 S. W. 2d 109, 113:

> "Therefore, it seems to be the proper interpretation of the opinion [in *Westinghouse*] and to be the conclusion of the Supreme Court, as the logical converse (since a union may not maintain such a suit for its members in a federal court), that individual employees may maintain a common law action in a state court to recover alleged unpaid wages due them

on contracts of hire made under or by virtue of a collective bargaining agreement executed under the provisions of the National Labor Relations Act. We so hold."

This Kentucky case should be compared with another Kentucky case — *Harbison-Walker Refractories Co.* v. *United Brick & Clay Workers*, 339 S. W. 2d 933 (cited in *Lucas Flour*, 369 U. S. at 102, n. 10)—where the same court considered itself bound to follow federal labor law in a Section 301(a) type action.

Our conclusion from the above is that in this case where individual employees are suing in the state court to assert their "uniquely personal right" (not a federal "right") to compensation due to an alleged breach of a collective bargaining agreement, there is no federal jurisdiction under 301(a) and no federal question presented which would empower this Court to review a decision of the Michigan court if it is permitted to act. It follows that the state court would be free to proceed "to dispose of this litigation exclusively in terms of local contract law," unlike *Lucas Flour*, 369 U. S. at 102, and that a Federal court acting in the premises, jurisdiction being based on diversity and jurisdictional amount, would be required to follow such local contract law pursuant to *Erie R. Co.* v. *Tompkins*, 304 U. S. 64.[23]

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[23] If federal courts, entertaining an employee's suit on the basis of diversity and necessary jurisdictional amount (Title 28, U.S.C., §1332 (a)), were to apply substantive law other than that of the state in which the court sits, the serious constitutional problems noted in *Bernhardt* v. *Polygraphic Co.*, 350 U.S. 198, would appear to arise.

C.

THE PRIMARY, EXCLUSIVE JURISDICTION OF THE NATIONAL LABOR RELATIONS BOARD PRE-EMPTS AND EXCLUDES STATE COURT JURISDICTION IN THIS CASE.

A proper approach to the question of Federal pre-emption and its relevancy to this case requires consideration of exactly what is here involved. If this is not a suit within the purview of § 301(a), and we believe it is not for the reasons previously set forth, then it is beyond the Federal question jurisdiction of this Court to review. That being the case, the key reasoning in *Dowd Box* supporting concurrent state and Federal court jurisdiction under § 301(a) would be lacking, since this Court would not be in a position to "resolve and accommodate . . . the diversities and conflicts" which might arise by reason of the state court's independant exercise of its common law jurisdiction. *Dowd Box*, 368 U. S. at 514. Absent such opportunity for review, the potential, indeed probable, conflict with decisions of the National Labor Relations Board in the same area clearly justifies pre-emption of the Michigan court's jurisdiction and recognition of the Board's exclusive jurisdiction. We perceive no valid argument to the contrary. Petitioner and Amicus in their briefs, assuming as they do that this is a § 301 action, advance none.

However, assuming *arguendo* that this case is within the purview of § 301(a), there still remain compelling reasons why Federal pre-emption should apply. There is here presented for the first time to our knowledge asserted state court jurisdiction over conduct concededly subject to the National Labor Relations Board's traditional jurisdiction as to which the Board was empowered to grant the same

relief as the state court.[34] Not only is the remedy parallel but, likewise, the state court, at least in theory, would apply the same substantive law to the cause of action that has been developed by the Board in unfair labor practice proceedings under § 8(a)(3). This is so because the state court, although acting under the guise of breach of contract, must interpret contract language which simply paraphrases the statutory language of the Act, defining unfair labor practices and more particularly § 8(a)(3). There is in reality no basic difference between the contract provision relied on here and one which does no more than incorporate that Section of the Act by reference. In either case it is equally clear that the contracting parties have merely restated, by reference or otherwise, a statutory obligation.[34a] That being

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[34] Thus Brief of Amicus (n. 15 at p. 16) concedes that relief would be substantially the same, and recognizes that it was agreed in the Court below the action alleged as constituting a breach of contract would also constitute an unfair labor practice under Section 8(a)(3) of the Act (AB, 3 and n. 3).

[34a] Section 8(a)(3) of the National Labor Relations Act (29 U.S.C. 158(a)(3)) makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."

Amicus concedes (AB, 17, 18 footnote 17) that if a collective bargaining agreement merely adopted "as such a wide range of obligations imposed by the National Labor Relations Act, but provided judicial remedies ***, it could perhaps be urged with some force that the parties were attempting to frustrate the congressional policy of providing an exclusively administrative remedy for the statutory obligations".

This is exactly our case, except that the contract provision involved does not contain a "wide range of obligations", only one. This is also our argument. To attempt to attribute to the provision against discrimination some meaning other than has been developed by the NLRB under §8 (a)(3) of the Act is to ignore the practicalities of collective bargaining and assume that the parties possessed a degree of sophistication that is totally unrealistic. By the contract provision the parties did no more than agree to obey the law, specifically §8 (a)(3). This is not an unusual bargaining request despite its seeming superfluity. But to say that the parties by such a provision "are prescribing their own *substantive code of conduct* for the treatment of employees" (AB 18, n. 17) is, we believe, totally unrealistic. The only "substantive code" possibly contemplated by the parties is that developed by the National Labor Relations Board under §8 (a)(3) and its predecessor section of the Wagner Act, and this would be the only point of reference for a court attempting to enforce such a provision.

the case, the state court (and jury), were it to hear the case on the merits would have no point of reference as to the substantive law to be applied other than the Board's decisions.[25]

This is indeed a novel proposition to state courts which have in the past uniformly and almost without exception deferred to the exclusive competence of the Board in all actions (including breach of contract) involving an unfair labor practice.[26] Reflecting this uniform respect for the Board's expertise in this area, the Ohio court in a contract case remarked:

> "... Unfair labor practices, as defined by Section 8 of the National Labor Relations Act, are the most distinctive new rights and duties created by the Act, the enforceability of which is confided to the National Labor Relations Board to the exclusion of any and all State courts. ...
>
> "... While the National Labor Relations Board's jurisdiction is not expressly made exclusive, we assume that it is exclusive as to all those unfair labor practices that were created by the Act."

General Electric Co. v. *UAW-CIO*, 93 Ohio App. 139, 108 N.E. 2d 211, 219-220.

The total impact of Petitioner's argument should be fully understood. If recognized in the context of this case it will establish that the Board's jurisdiction over unfair labor practices as defined in § 8 is not exclusive, and that every state and federal court has the power to act in this area

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[25] As Amicus puts it in its brief (pp. 24, 25) "... the State court would be obliged to decide it in accordance with principles of federal labor law, in the ascertainment of which it will, of course, look to decisions of the Board."

[26] *Holman* v. *Industrial Stamping Co.*, 344 Mich. 235, 74 N.W. 2d 322; *Holman* v. *Industrial Stamping Co.*, 142 Fed. Supp 215 (ED. Mich.) indicate the confusion which could result if the Board's primary jurisdiction is not recognized.

where there is a labor contract within the purview of § 301 (a). Further, that this may be done at the suit of an individual employee, the union not being a party to the action or its position known. No showing need be made of any prior recourse to the Board, and the Board will have no standing before the court. Its views, except as the court may try to decipher them in reported decisions, will not necessarily control.

All of this is accomplished by use of the magic term "contract," which by some alchemy transforms the "unfair labor practice" into something else which trial courts are free to act on. We are in this respect reminded of the language of the Chief Justice in his dissenting opinion in *International Association of Machinists* v. *Gonzales*, 356 U.S. 617, 632:

> "The majority draws satisfaction from the fact that this was a suit for breach of contract, not an attempt to regulate or remedy union conduct designed to bring about an employer discrimination. But the presence o sence of pre-emption is a consequence of the effec of state action on the aims of federal legislation, not a game that is played with labels or an exercise in artful pleading."

The label "breach of contract" should not be permitted to frustrate federal regulation and national policy.[27] That is

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[27] The reasoning which we believe should be adopted in this case is that suggested by the late Judge Parker in his opinion in *Textile Workers* v. *Arista Mills*, 193 F d 529 (CA 4). That case did not involve a contract provision prohibiting an unfair labor practice by the employer, as does this case. The Court of Appeals there ordered enforcement of a strike settlement agreement, at the suit of a union, which reinstated striking employee on certain conditions, even though the employer's conduct, which was the subject of the agreement, was both a breach of contract and an unfair labor practice. 193 F 2d at 534. However, the opinion made this significant statement (193 F 2d at 533):

> "We do not mean to say that, merely because a bargaining contract may forbid unfair labor practices, the courts have jurisdiction to

exactly what is accomplished here if the courts are permitted to directly invade the area of § 8 rights and duties. Unless we misunderstand the prior decisions of the Court, the National Labor Relations Board has been since its inception the "paramount administrative or quasi-judicial authority in connection with the development of federal American law regarding collective bargaining," and prior to the Labor Management Relations Act, 1947, was the sole agency determining rights made enforceable by the Act, to the exclusion of the Federal trial courts.[2] In fact, it is the Board, subject to judicial review, which has developed the entire body of law governing the peculiar and distinctive body of rights and obligations comprised in Section 8 of the Wagner Act, as amended by the Taft-Hartley Act. We do not understand that the 1947 Act was intended to affect this primary exclusive jurisdiction over unfair labor

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afford relief against them under guise of relieving against breaches of contract. • • • We think it clear that parties may not by including a provision against unfair labor practices in a bargaining agreement vest in the courts jurisdiction to deal with matters which Congress has placed within the exclusive jurisdiction of the National Labor Relations Board."

cf. also *United Packinghouse Workers* v. *Wilson & Co.*, 80 F. Supp 563 (D. Ill.); *Local 774, IAM* v. *Cessna Aircraft Co.*, 341 P. 2d 989, 994 (Kans. Sup. Ct.); *"Jurisdiction of Arbitrators and State Courts over Conduct Constituting Both a Contract Violation and an Unfair Labor Practice,"* Note, 69 Harv. L.R. 725 (1956).

The cases bearing on the general question of Federal pre-emption are gathered in Petitioner's Brief at pp. 16-17, n. 2, and will not be repeated here.

For the reasons hereinafter stated we do not quarrel with those decisions upholding jurisdiction under § 301(a) despite the involvement of an unfair labor practice where the suit is one by a union to compel arbitration as in *United Steelworkers* v. *New Park Mining*, 273 F 2d 352 (CA 10). Nor, for the reasons set forth in 1, A and B of our brief, do we believe that this suit by an individual employee is controlled by those cases where the union brings the action and it is within the purview of § 301, as is true of most of the cases cited by Petitioner.

[2] H Rep. No. 447, 74th Cong. 1st Sess., p. 24; S. Rep. No. 573, 74th Cong. 1st Sess., p. 15; *Meyers* v. *Bethlehem Corp.* 303 U.S. 41, 48; *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U.S. 261, 265; *National Licorice Co.* v. *Labor Board*, 309 U.S. 350, 364; *Amazon Cotton Mill Co.* v. *Textile Workers Union*, 168 Fed. 2d 182, 186 (CA 4).

practices,[29] excepting only in those few instances where Congress gave limited jurisdiction to the federal or state courts, or both, over such practices, as in § 10 (j), § 10 (l), and § 303.[30] In no other instance did the Act confer jurisdiction upon state or federal courts to deal with unfair labor practices. Thus in § 303 Congress expressly granted concurrent jurisdiction over suits against labor organizations where their conduct came within the prohibited area of § 8 (b)(4) of the Act. This would imply that Congress intended that other types of actions charging labor organizations with different unfair labor practices were excluded. This does not follow at all if Petitioner's argument is accepted. For under his version of § 301 (a) (which does not even mention unfair labor practices by reference or otherwise) an individual employee would be perfectly free to sue his union, or a union to which he does not belong, in any state or federal court for what is concededly an unfair labor practice under § 8 (b). This *tour de force* is accomplished as in the present case by the simple insertion in

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[29] We find nothing in the legislative history of the Senate Bill characterizing breaches of labor contracts as "unfair labor practices," and vesting jurisdiction in the Board and the Federal district courts which indicates an intention to reach "unfair labor practices" under guise of breach of contract. Its subsequent rejection, which left enforcement of collective agreements to the "usual processes of the law," does not appear to evidence an interest to diminish or permit encroachment on the Board's jurisdiction by the courts under guise of breach of contract. S. 1126, Sec. 8 (a)(6) (employer), Sec. 8 (b)(5) (union), 80th Cong. 1st Sess.; H.R. 3020, Sec. 8 (a)(6) (employer), Sec. 8 (b)(5) (union), 1 Legislative History of the Labor Management Relations Act 1947 (G.P.O.) pp. 111, 114, 239, 241, 426, 429, 474, 545; 2, op. cit., p. 982.

[30] Thus, § 10 (j) (Title 29, USC § 160 (j)) gives the Board under certain circumstances the right to petition the United States district court for temporary relief where an unfair labor practice has been committed.

§ 10 (l) (Title 29, USC § 160 (l)) the Board in § 8 (b) (4) (A) (B) or (C) (Title 29, USC § 158 (b)) cases is given the authority to petition the United States district court for appropriate injunctive relief against the unfair labor practice.

§ 303 (Title 29 USC § 187) gives any person the right to sue in a state or federal court when he has been injured in his business or property by a boycott, which may also be a violation of § 8 (b) (4).

labor contracts (as is often done) of a provision paraphrasing the statutory language of or incorporating by reference § 8 (b)(1)(A).[31]

The issue, as we view it, is therefore quite narrow, despite the importance of its implications. This case clearly falls within that class of cases where "Obvious conflict, actual or potential, leads to easy exclusion of state action." *Weber* v. *Anheuser-Busch*, 348 U.S. 468, 490.

Petitioner's principal reliance is on two cases decided at the last term—*Dowd Box Co.* v. *Courtney*, 368 U. S. 502, and *Local 174, Teamsters Union* v. *Lucas Flour Co.*, 369 U. S. 95. The factual basis for the holding in those cases was such that the question which this case poses could not have arisen, although the principle there stated is admittedly broad enough to reach this case. In *Dowd Box*, pre-emption was at best a secondary argument by Petitioner, if it was argued at all.[32] The conduct which was there alleged to be "arguably" subject to the Board's exclusive jurisdiction was Petitioner's refusal to bargain with Respondent. There was no contract provision at issue such as in this case, and although Petitioner's alleged refusal to bargain might have been within the jurisdiction of the National Labor Relations Board, that agency was powerless to grant the relief sought by Respondent in the Massachusetts court, i.e., specific enforcement of the labor contract negotiated

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[31] Dunau, *"Contractual Prohibition of Unfair Labor Practices Jurisdictional Problems,"* 57 Col. L. R. 52, 68, 69.

Section 8 (b)(1)(A) (Title 29, USC §158(b)) provides that "It shall be an unfair labor practice for a labor organization (1) to restrain or coerce (A) employees in the exercise of their rights guaranteed in section 157 of this title ***."

[32] *Dowd Box Co.* is discussed in Petitioner's brief at pp. 12-14 and in brief of Amicus, p. 10; *Lucas Flour Co.* is discussed by Petitioner at pp. 14-18, by Amicus, pp. 8-9.

Petitioner's brief in *Dowd Box*, pp. 21-26. Petitioner in *Dowd Box* agreed with Petitioner in this case that Federal pre-emption did not apply to a Sec 301 case, which in his view was limited to the Federal courts.

by the parties. *Labor Board* v. *Insurance Agents Union*, 361 U.S. 477. Nor was the Massachusetts court, as is the case here, called upon to determine under guise of contract whether Petitioner had committed an unfair labor practice. However, the Court did, in *Dowd Box*, reject the pre-emption doctrine, as announced in *Garner* v. *Teamsters Union*, 346 U. S. 485, 490-491, as support for Petitioner's argument that Congress had restricted suits to enforce contracts under Section 301 of the Labor Management Relations Act to the Federal district courts.

In this connection the Court also noted that Congress had expressly rejected the policy announced in *Garner* with respect to violations of collective agreements by rejecting a proposal to make the breach thereof an unfair labor practice, and instead deliberately left their enforcement to "the usual processes of the law." 368 U. S. at 513.

Lucas Flour did not involve an unfair labor practice. In a state court action by an employer against a union for damages for business losses due to breach of an implied no strike clause, the union raised as one defense that its strike was either arguably protected under Section 7, or prohibited by Section 8 of the Act. This, it was argued, gave the National Labor Relations Board primary jurisdiction to determine whether the strike was protected or prohibited, and excluded the state court's power to act. The Washington court held that Federal preemption as set forth in *San Diego Building Trades* v. *Garmon*, 359 U. S. 236, did not apply because the union's conduct was not arguably protected or prohibited by the Act. This Court held that the state court had jurisdiction, applying Federal law pursuant to Section 301 of the Labor Management Act, even though the union's activity was arguably protected by Section 7 of

the Act. In this connection, the court pointed out (369 U. S. at 101, n. 9) that the pre-emptive doctrine of cases such as *Garmon*, based upon the exclusive jurisdiction of the National Labor Relations Board, is not relevant where the suit is for violation of a collective bargaining contract within the purview of § 301(a). So that again, assuming this to be a § 301 type action, although the facts in *Lucas Flour* do not reach this case, the broad principle there stated apparently does.

In *Lucas Flour* the Court did add this statement (369 U. S. at 101, n. 9):

> "* * * It is, of course, true that conduct which is a violation of a contractual obligation may also be conduct constituting an unfair labor practice, and what has been said is not to imply that enforcement by a court of a contract obligation affects the jurisdiction of the N. L. R. B. to remedy unfair labor practices, as such."

We respectfully submit that our case demonstrates the manner in which court enforcement of a contract obligation can affect the jurisdiction of the Board to remedy unfair labor practices, as such, in those instances where, as here, the contract obligation simply restates the statutory obligation. In such a case, the individual employee has the choice of proceeding against either party to the contract (if both assume obligations) in a state court or before the Board. Since the Board does not act *sua sponte* but only on charges filed, the option is entirely the employee's, subject to no control by the Board. If the Board's jurisdiction is not invoked, before the statutory period for filing charges has elapsed, then there is no recourse to the Board, and a decision adverse to the employee is not subject to review by the Board. The Board is powerless to find (as Amicus suggests,

AB. 25) that such decision was contrary to Board principles and provide its own remedy. This choice of forums where there is an unfair labor practice alleged likewise neatly circumvents the limitations period provided by Congress in Section 10(b) of the Labor Management Relations Act.[33] Congress approved this provision (there was none in the Wagner Act) over the heated objections of the minority, and with the obvious purpose of requiring the prompt settlement of disputes.[34] This purpose is most certainly frustrated if an aggrieved employee may, as he could have done in this case, wait six (6) years (the Michigan limitation period on contract actions)[35] to commence an action against his employer or union. In *Anson* v. *Hiram Walker & Sons;* 222 F. 2d 100 (CA 7), cert. den. 350 U. S. 840, after remand, 248 F. 2d 380, where the employees (their claim involving an unfair labor practice), as was the case here, failed to file charges with the National Labor Relations Board within the statutory period, the Court of Appeals dismissed their action, saying (248 F. 2d 381):

> "*** To hold that plaintiffs have exhausted their administrative remedies, when the record discloses that, by their own neglect, they have failed to avail themselves of those remedies within the statutory period, would put to naught the limitation provisions of the Act and substitute a rule not provided by Congress to the effect that the suit must be entertained in spite of the fact that by their own acts they deprived themselves of their right to invoke their administrative remedies."

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[33] Title 29, USC § 160 (b). Quoted in full under Statutes, supra.

[34] Minority Rep. No. 105, PT 2, n. S. 1126, 1 Legislative History of the Labor Management Relations Act 1947 (GPO) 467; Remarks of Senator Wagner, Cong. Rec., 2 op. cited, 998; Remarks of Senator Murray, Cong. Rec., 2 op. cited, 1455.

[35] §609.13, Compiled Laws of Michigan, 1948. Quoted in full under Statutes, supra.

In cases such as this, the approach most consistent with the policies of the Act and its coherent enforcement is to require individual employees to file charges with the Board, and to exhaust the grievance machinery including arbitration, if provided, of the collective agreement, before resorting to "legal warfare," *Anson* v. *Hiram Walker & Sons*, cited, 222 F. 2d at 103. Where the grievance on its face charges an unfair labor practice, to encourage litigation without resort to the Board is to bypass remedies expressly created by Congress, and to circumvent the plain mandate of Congress that jurisdiction of such matters be vested exclusively in the Board. *Myers* v. *Bethlehem Corp.*, 303 U.S. 41, 50. Where, as here, the Board remedy is adequate, and the Board is required to act if there is merit to the charge, we can perceive no good reason why individual employees should be encouraged to litigate in the courts without any showing of prior resort to the Board or the grievance machinery of the contract. We simply do not follow argument of Amicus (AB 18) that requiring prior resort to the Board would result in added expense, inconvenience and delay where the grievance on its face, as in this case, charges an unfair labor practice. Processing such a charge certainly involves no great expense, and as to the delay and inconvenience, the congestion of our state court dockets certainly matches that of the Board's. If no unfair labor practice is found by the Board, then a state court should be foreclosed from acting in any event, where, as here, the contract provision does no more than paraphrase an unfair labor practice.

It is argued that the parties by their collective agreement "chose" the state court as a forum for the enforcement of this obligation, and that this is an agreed upon procedure for enforcing them (AB. 13 et seq.). It is urged that to con-

fine Petitioner to his remedies before the Board would defeat the contractual expectations of the parties (AB. 17). These arguments not only ignore realities but encourage the decentralization of the administration of the substantive rules which Congress entrusted to the Board in the Wagner Act and the Taft Hartley Act. This contract spells out no procedure whatsoever for the enforcement of obligations. There is no "chosen" forum. Except for the fact that contracts are generally enforceable in the courts—provided that the grievance machinery established by the contract has been exhausted—there is absolutely no basis for the inference that the parties (one of whom, the union, is not a party to this case) intended that a state trial judge should sit to determine, under guise of breach of contract, whether an unfair labor practice has been committed. It is at least equally fair to assume that the parties by incorporating a statutory obligation, intended that the Board should and would remedy such conduct. At the time this contract was negotiated no state court to our knowledge had ever taken jurisdiction of a conceded unfair labor practice under guise of breach of contract. Illogical as it may seem, the parties during collective bargaining often request that a statutory obligation, e.g. recognition of the union as exclusive bargaining agent, or a provision against discrimination such as this, be inserted—a request that is usually readily acceded to because it is thought to do no more than require a party to obey the law. The argument with regard to "contractual expectations" and "confining the Petitioner to his remedies before the Board" in the context of this case can have no other purpose than to encourage "forum shopping" and "diversities and conflicts." It necessarily implies that Petitioner should have the right to choose the state court or Board depending on which he believes will give him a

better reception. Since the conduct involved here is an unfair labor practice, whether we call it "contract breach" or by its proper name, it is impossible to perceive how a "second-hand" reading of the Board decisions by a state court to determine whether Petitioner has been discriminated against because of union activity can help but create confusion, diversity and conflict. Nor is there any sound basis for Petitioner's attempt to differentiate between law "involuntarily" imposed, i.e., in tort and regulation by statute cases, and a common law breach of contract case. In either case, it is the state court which regulates, according to its own conception of the parties rights, by injunction or the award of damages, the conduct of the parties. Where litigation or "legal warfare" is suggested as a "chosen" forum for the resolution of a labor dispute which the Board is fully as capable of remedying, the suggestion accomplishes nothing but confusion and conflict.

By contrast, arbitration as it appears in most labor contracts is clearly a method of final adjustment agreed upon by the parties and one which Congress declared to be "the desirable method of settlement of grievance disputes." Section 203 (d) of the Act; *United Steelworkers v. American Mfg. Co.*, 363 U. S. 564, 566. Arbitration is specifically mentioned as preferred method of settling labor disputes in Section 201 (b) of the Act. An arbitration clause in a contract does truly choose the forum, in some cases even the arbitrator is named. This Court made it clear in *Lincoln Mills* that Congress intended to place "sanctions behind agreements to arbitrate grievances." 353 U. S. at 456. The importance of the arbitral process was further emphasized in *United Steelworkers v. Warrior & Gulf Co.*, 363 U. S. 574, 578:

"A major factor in achieving industrial peace is

> the inclusion of a provision for arbitration of grievances in the collective bargaining agreements."

and, (at p. 58)

> "* * * the grievance machinery under a collective bargainin gagreement is at the very heart of the system of industrial self-government."

Cf. also *Drake Bakeries, Inc.* v. *Bakery Workers*, 370 U. S. 254, 263. The legislative history of Taft-Hartley shows an acute awareness of the desirability of adjusting grievances through the grievance machinery (including arbitration) provided by a labor contract before resorting to economic or legal warfare. Voluntary arbitration is a different process than litigation, which has very little to recommend it as a means of settling labor disputes.

We have no intention of unseating the arbitral process in this case—indeed it is not involved here except for the fact that both obligations spring from the contract. Despite any seeming illogic in permitting an arbitrator to act and not a state court, we do not urge that an arbitrator be excluded from acting where an unfair labor practice is involved. There are several reasons for this. There are nearly always strict limitations timewise on the processing of grievances to and through arbitration. Consequently a party to the contract—be it the union or the employer—is not faced with a state statute of limitations which may permit the grievance to fester for years before it becomes the basis of litigation. Arbitration is always a proper subject of enforcement and review under Section 301(a), and diversities and conflicts can be corrected by this Court. Common law litigation by an employee in a state court such as is the case here is not subject, in our opinion, to such review, for the reasons previously stated. The Board, as Amicus points out (AB 22-24), moreover, has since its earliest days

declined to exercise jurisdiction with respect to unfair labor practices which have been, or could have been, submitted to arbitration under the collective bargaining process. We know of no such policy of deferring to the jurisdiction of a state court. Indeed it is quite impossible, since once a state court's jurisdiction is recognized it is absolute. It is not required to defer to the Board. In fact it cannot be bound by a Board decision involving the same parties as *res judicata* does not apply in such cases.[36] Accordingly, once jurisdiction attaches over an unfair labor practice under guise of breach of contract, it cannot thereafter be disturbed except by review—which we believe to be limited to the state supreme court.

It is therefore our position that the proper and coherent administration of the National Labor Relations Act requires that the primary, exclusive jurisdiction of the National Labor Relations Board over unfair labor practices be recognized in this case, and that encroachment thereon be denied where, as here, a state court's jurisdiction is invoked under guise of breach of contract, seeking the same relief that could have been secured from the Board.

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[36] Further instances of the conflicts which will develop between the courts and the Board, if Petitioner's argument is fully accepted, are noted by Amicus (AB 25, n. 30). *Local 1505, IBEW* v. *Local 1836, IAM*, decided June 4, 1962, 50 LRRM 2337 (CA 1); *Portland Web Pressman's Union* v. *Oregonian Publishing Co.*, 286 F 2d 4 (CA 9), cert. den. 366 U.S. 912; *Modine Mfg. Co.* v. *Grand Lodge Ass'n. of Machinists*, 216 F 2d 326 (CA 6). In such cases Amicus urges that the courts defer to the judgment and expertise of the Board. We agree. Our point of disagreement apparently is that we also believe the expertise of the Board to be equally helpful where discrimination under Sec. 8(a)(3) is charged.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court below be affirmed.

Respectfully submitted,

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